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Supreme Court of the United States

OCTOBER TERM, 1958

No. 767

MILWAUKIE COMPANY OF JEHOVAH'S WITNESSES, an Oregon Corporation,

Appellant,

vs.

LEONARD MULLEN, Mayor and FRED O. ROBERTS, PETE MORTONSEN, RALPH E. KLEIN, and EARL CLAY, City Councilmen, comprising the City Council of the City of Milwaukie, Oregon,

Appellees.

APPEAL FROM THE SUPREME COURT OF OREGON

STATEMENT AS TO JURISDICTION

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LEONARD MULLEN, Mayor and FRED O. ROBERTS, PETE MORTONSEN, RALPH E. KLEIN, and EARL CLAY, City Councilmen, comprising the City Council of the City of Milwaukie, Oregon,

Appellees.

APPEAL FROM THE SUPREME COURT OF OREGON

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the Supreme Court of Oregon dated September 17, 1958, which holds constitutional an ordinance prohibiting the issuance of a permit to appellant to build a church within the City of Milwaukie located within the R-1 residential zone providing for churches and other public buildings. The denial was upheld because of traffic congestion. This jurisdictional statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the Supreme Court of Oregon is reported. (*Milwaukie Company of Jehovah's Witnesses* v. *Mullen*, 330 P. 2d 5 (Sept. 17, 1958)) It is printed separately and accompanies this statement. It is marked Opinion of Supreme Court of Oregon Accompanying Jurisdictional Statement. [Tr. 20 (1-44); Op. 1-42][1]

JURISDICTION

This case involves a judgment of the Circuit Court of Clackamas County, Oregon, discharging an alternate writ of mandate in a suit brought to compel the members of the City Council of the City of Milwaukie, Oregon, to issue a special use permit to the appellant to build a church in the 3-R-1 residential zone of the city, which permitted churches and other public buildings in the area. [Tr. 14 (21-22)] An appeal was timely taken to the Supreme Court of Oregon. [Op. 1] The Supreme Court of Oregon, on September 17, 1958, entered a judgment of affirmance of the judgment of the Circuit Court. [Tr. 21-22][2] A notice of appeal to this Court from the judgment of affirmance was filed within the 90-day time limit on December 2, 1958. [Tr. 1] Pursuant to an order of the Chief Justice of the Supreme Court of Oregon dated December 16, 1958, the time for filing the statement as to jurisdiction was extended to April 1, 1959. [Tr. 7] This Court has jurisdiction of this appeal under 28 U. S. C § 1257 (2).

ORDINANCE INVOLVED

Relevant portions of Ordinance 481 of the City of Milwaukie, Oregon, involved upon this appeal are here set forth.

[1] Figures appearing herein within brackets and proceeded by "Tr." refer to pages of the typewritten transcript prepared by the Clerk of the Supreme Court of Oregon. Those preceded by "Op." refer to pages of the printed opinion accompanying this statement.

[2] The judgment appears as Appendix A of this statement, *infra*, at pp. 19-20.

Sections 2 and 3 of the Ordinance read as follows:

Section 2. Scope. No building or land shall hereafter be used and no building or part thereof shall be erected, moved or altered unless in conformity with the regulations herein specified for the district in which it is located except as otherwise provided herein. No permit for the construction or alteration of any building shall be issued unless the plans, specifications, and intended use of such building conform in all respects with the provisions of this ordinance.

Section 3. Minimum Requirements for General Welfare. The provisions of this ordinance shall be deemed the minimum requirements to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; to prevent undue concentration of population; to lessen the congestion on streets; to facilitate adequate provisions for community utilities and facilities such as transportation, water, sewage, schools, parks and other public requirements and to promote the public safety, health, convenience, comfort, prosperity and general welfare of the people of the City of Milwaukie, Oregon.

Section 16, subsection 3 of the Ordinance reads as follows:

In the residential zone no building or premises shall be used, and no building shall hereafter be erected or structurally altered, unless otherwise provided in this ordinance except for one or more of the following uses.

1. One family dwelling. 2. Libraries and art galleries. 3. Parks (including park buildings). 4. Accessory buildings and uses, such as are ordinarily appurtenant to single family dwellings, shall be permitted, including one private garage, when located not less than twenty (20) feet from any flanking street line, or when attached to or within the dwelling.

5. The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings are permitted provided that no window display is made or any sign shown other than one not exceeding two square feet in area, which if illuminated, shall be of non-flashing low candle power design, and shall bear only the name and occupation of the occupant.

The renting of rooms for lodging purposes only, for the accommodation of not to exceed eight persons, in a single family dwelling may likewise be permitted with the approval of the Commission subject to review by the Council.

Section 16, subsection 3 (8) of the Ordinance reads as follows:

Special permits are required from the Commission for the following uses.

(A) Circuses, Fairs, Carnivals
(B) Nursery or Greenhouses
(C) Telephone Exchange
(D) Electric Substations
(E) Churches
(F) Schools (Public or Private)
(G) Lodge Buildings or Fraternity Houses
(H) Playgrounds and Parks
(I) Two Family Dwellings

Such permits are to be issued after the commission has been satisfied as to the propriety of such use. The Commission may limit the duration of such permits as it may deem advisable.

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I.

Where appellant applied for a permit to build and use a church in the City of Milwaukie under the above Ordinance, which was denied under the "public welfare" provisions of Section 3 of the Ordinance because (1) there was a creation of traffic congestion in the area, and (2) annoyance, inconvenience, disturbance to neighbors and devaluation of surrounding property, do Sections 2, 3 and 16 of the Ordinance, as thus construed and applied, abridge appellant's rights to freedom of religion and assembly, contrary to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing such rights?

II.

Where the proof showed that, because of the above-stated vague and indefinite grounds under the vague, indefinite and dragnet "general welfare" and "public convenience" provisions of Sections 2 and 3 of the Ordinance the administrators of the Ordinance refused appellant a permit to build a church, do Sections 2 and 3 of the Ordi-

nance, as thus construed and applied, confer ungovernable discretion on the City Council so as to deny appellant's constitutional rights of freedom of religion and assembly, contrary to the First Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

History of Proceedings

Appellant filed a petition with the Circuit Court of Clackamas County, Oregon, called an amended writ of mandamus. [Tr. 14 (1-13)] This followed the issuance of the alternate writ of mandamus. [Tr. 14 (1)] The appellees answered, admitting and denying certain allegations contained in the amended writ of mandamus. [Tr. 14 (14-16)] Upon the pleadings, the case went to trial, at which testimony and documentary evidence were received. [Tr. 15 (1-30)] At the close of appellant's case, appellees made a motion to dismiss the writ, which was in effect a demurrer to the appellant's evidence. [Tr. 14 (31)] The Circuit Court sustained the motion. [Tr. 14 (32)] An oral opinion was delivered by the Circuit Court. [Tr. 14 (16-21] The Circuit Court entered a judgment discharging the writ. [Tr. 14 (21-22)] On appeal to the Supreme Court of Oregon the judgment was affirmed on September 17, 1958. [Tr. 21-22] See 330 P. 2d 5.

Material Facts

It was alleged that appellant corporation owned a lot of land 100 feet by 100 feet on Penzance Street in the 3-R-1 zone for private homes, providing many other public and nonresidential uses on special permit by the City Council. [Tr. 14 (2-3, 4-5, 14-15)] This allegation was admitted by the appellees. [Tr. 14 (2-3)]

The appellees admitted the allegation that a proper written application was made for a special use permit for a

church under the Ordinance, together with plans and specifications, which showed (1) a $15,000 one-story church building comparable to other church buildings, sightly in appearance, which would be ornamental in the residence district and harmonize in every way with the surrounding homes; (2) that it would set back 30 feet from property line on Penzance Street; (3) that is would have ample off-street parking; and (4) that the building would comply with "all the ordinances" and with the building code as it applies to "all buildings built in the vicinity of said church." [Tr. 14 (8-9, 15)] It was alleged that the application for a special use permit was made to the City Planning Commission who considered it and heard protests and then denied the application for a special use permit. [Tr. 14 (9-10)] This allegation was also admitted. [Tr. 14 (15)]

The appellees admitted that appellant duly appealed from the decision of the Planning Commission to the City Council, which held a hearing on the application on August 24, 1953, and that the Council, after considering the appeal, evidence offered and the remonstrances by other property owners, denied the appeal. [Tr. 14 (15-16)]

Upon the hearing before the City Council, there was received into evidence Plaintiff's Exhibit 1, a photograph of a model of the building, constructed according to scale. [Tr. 15 (5, 6)] Upon such hearing other facts, to augment the admissions of the City of Milwaukie, were shown to have been proved to the City Council. Let them now be stated.

There would be only two exceptional meetings yearly that would bring more cars than the off-street parking would accommodate. [Tr. 15 (7)] The number of cars usually parked at the meetings would average 10 to 12 cars and never more than 15. [Tr. 15 (15, 18)] Proposed church would seat a maximum of 140 persons. [Tr. 15 (16)] A plan was made for an increase in membership by 62. [Tr. 15 (16-17)] If the congregation grew to where it exceeded 100 to 200, there would be a division and a new church formed. [Tr. 15 (18-19)] Meetings would be four each week and total

five hours. [Tr. 15 (7)] One meeting would be two hours and the others one hour. All meetings would be at night, except one on Sunday afternoon. [Tr. 15 (7-8)] All meetings, except the Sunday afternoon public meeting, would open with a song and prayer. The meetings of Jehovah's Witnesses are peaceable and quiet church services and Bible studies. [Tr. 15 (7)]

The evidence showed that the area served by the proposed church extends from the south limits of Portland to the north limits of Gladstone. [Tr. 15 (12)] While not all active members of the congregation reside within Milwaukie, they do reside within the area of which Milwaukie is the center. [Tr. 15 (12-13, 16)] The presiding minister of the congregation said that the congregation emanated from that center or church located in Milwaukie. [Tr. 15 (16)] The evidence showed that, in addition to attending church meetings, the congregation engaged in door-to-door and street preaching in the area. [Tr. 15 (19)] The proposed church had to be located where it was proposed, in the center of the territory, to accommodate all. For that reason, the particular property was chosen in that location. [Tr. 15 (19-20)]

There are two other churches in the neighborhood where the proposed church of appellant is to be located. One is a Church of Christ and the other is a Catholic Church. [Tr. 15 (9)]

The City Council held a hearing upon the appeal from the Planning Commission. [Tr. 15 (22)] Its reasons for denial of the permit were traffic hazards and the welfare of the surrounding residents. [Tr. 15 (23)] The City Council denied the permit to build because the "people in general had other reasons that became more or less known" to the City Council, which are objections to the church "at that point." [Tr. 15 (23)] The City Council, in denying the permit, chose to recognize "the thought of the people within the city rather than those without." [Tr. 15 (24)]

The Council insisted that traffic hazards would be pro-

duced by the building of the proposed church or that the church would result in "an undue amount of traffic on that street, to which other residents objected." [Tr. 15 (24)] The City Council concluded that this would come from only 10 or 12 cars of worshipers attending the four meetings each week. In reaching its determination to deny the permit, the City Council considered the "noise and fumes and lights and other general conditions in a residence neighborhood." [Tr. 15 (25)]

The City Council also denied the permit because many residents in the neighborhood appeared at the hearing and protested the granting of the permit to appellant. [Tr. 15 (27)] The City Council was concerned over the glare of the lights from the cars, the fumes and the noise when the cars would be started at night. [Tr. 15 (28)] It concluded that the 10 cars coming to the church would create a congestion that would not otherwise exist in a residential area. [Tr. 15 (30)]

How Federal Questions Raised and Determined

In paragraph VIII of appellant's amended writ of mandamus, it alleged that the Zoning Ordinance, which prohibited appellant from using the property as a church, was unconstitutional and void because it deprived appellant of that right, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States. [Tr. 14 (11-12)] The trial court held that the Ordinance was not so vague and indefinite in its terms so as to confer unlimited and uncontrollable discretion upon the City Council in the denial of the special use permit in this case. [Tr. 15 (17-18)]

The Supreme Court of Oregon said that the fourth contention raised by appellant upon the record before it was: "That the zoning ordinance and the actions of the Council trespass on the right of freedom of worship under the Fourteenth Amendment, interpreted as embracing the freedom guaranteed by the First Amendment." [Tr. 20 (6-7); Op. 6]

The opinion also states that appellant complained of the denial of the permit and mandamus because of findings of congestion of traffic and annoyance to neighbors in the area "constitutes a denial of freedom of religion, freedom of worship and freedom of assembly contrary to the First and Fourteenth Amendments." [Tr. 20 (28, 32-33); Op. 26]

These questions of the denial of freedom of assembly and freedom of worship, contrary to the First and Fourteenth Amendments, were expressly determined by the court below and extensively discussed by that court, including the complaint that the Ordinance was too vague and thus conferred unlimited and uncontrollable discretion upon the City Council. [Tr. 20 (28-44); Op. 26-37]

Each question upon this appeal raised under the United States Constitution or presented in this statement was specifically raised in the court below and passed upon adversely to the appellant by the court below. This Court should find that the questions raised must, therefore, be considered by this Court.

QUESTIONS RAISED ARE SUBSTANTIAL

While there are five separate questions stated in the notice of appeal and they have been reduced to the two questions stated above, *supra*, at pages 5-6, there is really only one fundamental question involved. This one basic question, together with incidental issues, will now be stated and then discussed under one heading below.

> ***The Zoning Ordinance, providing in Section 3 for vague and indefinite standards of "general welfare" and "public convenience," as construed and applied to appellant's proposed use of the property for a church so as to deny the church permit because of remote "traffic congestion" and "annoyance by noise and lights" of 20 to 30 automobiles coming to the property four times weekly, is unconstitutional because it abridges and denies appellant freedom of assembly and worship,***

contrary to the First and Fourteenth Amendments to the United States Constitution.

Section 3 of the Ordinance is said by the court below to be the section that saves it from the objection that it is vague and indefinite and, thereby, confers unlimited discretion on the City Council. [Tr. 20 (3, 4, 5, 29, 30); Op. 28-29] The court below says that freedom of religion cannot be abridged by laws conferring unlimited discretion and the provisions of this section lay down the standards that guides the council and prevents it from being unlimited delegation of discretion. [Tr. 20 (4, 5); Op. 4, 5] It is held that the provisions are sufficient to restrict the Council and thus prevent the powers under Section 16 from being unlimited.

The court below is in grave error in thus appraising Section 3. It is composed solely of vague and indefinite terms. The terms are "appropriate use of the land," "stabilize the value of property," "adequate open spaces for light and air," "prevent undue concentration of population," "lessen the congestion on streets," and "to promote the public safety, health, convenience, comfort, prosperity and general welfare of the people of the City of Milwaukie, Oregon." [Tr. 20 (3-4); Op. 3-4]

There is no place in Section 3 where the congestion of traffic or hazards from increased traffic is mentioned. The above-quoted terms—vague and indefinite though they are —were the provisions of the Ordinance that the court below held sufficient to give applicants for church permits and the courts specific and sufficient control over the administration of the law by the Council and not to make it unconstitutional. The court below limited the control in this case over the Council under the terms "general welfare" and "public convenience." [Tr. 20 (21a, 22); Op. 19] The court below found that "general welfare" was so vague and indefinite that it baffled anyone for a precise definition. [Tr. 20 (22);

Op. 19] The court below defined "public convenience" to be public need. [Tr. 20 (22); Op. 19]

The court below unwittingly demonstrated the vagueness of the terms "general welfare" and "public need" when it began to consider evidence found sufficient to support the Council's action. It held that the "public welfare" term prohibited traffic congestion and "public convenience" term prohibited discomforts to the neighbors from noise, fumes and lights resulting from 20 to 30 additional automobiles in the area four times weekly. [Tr. 20 (22-23); Op. 21] The court below then held that under the terms "general welfare" and "public convenience" it was for the courts to determine whether the action under the vague and indefinite terms was unreasonable and had no relationship to the police power. [Tr. 20 (23); Op. 20-21]—Compare *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (footnote 7).

The court below then concluded that because of great increase in population and registration of automobiles in Clackamas County and Oregon, of which judicial notice could be taken, there was sufficient evidence to justify the conclusion reached by the City Council. [Tr. 20 (21, 25); Op. 19, 22] The court below then held that it was not enough to impeach the City Council to show that the church had a very small attendance and that very few cars would be coming into the area four times weekly. [Tr. 20 (25A); Op. 23] Common sense would dictate a contrary conclusion on the record in this case. The court below said the test was whether there were a lot of people living in the area and that the heavy population was enough. [Tr. 20 (26); Op. 23-24] This means no church could be built in any urban area. The court below held that it would presume that the City Council had sufficient evidence before it o dangers to public welfare and public convenience. [Tr. 20 (:)); Op. 28]

In a case involving a zoning ordinance with terms identical to those of Section 3 of the Ordinance here, the District Court of Appeal for the First Appellate District of California (San Francisco) held that the same terms of

the ordinance there to be unconstitutional because of vague and indefinite grant of unlimited discretion. See *Redwood City Company of Jehovah's Witnesses* v. *City of Menlo Park*, 167 A. C. A. 778 (Feb. 9, 1959). In that case Section 20 of the ordinance provided for considerations of public welfare and convenience by the City Council in denying a permit, the same as does Section 3 in this case.

The court found that the only definite provisions relating to traffic congestion was the off-street parking provisions, which had been fully complied with by the church, as in this case. The court then held that "the general phrases," namely, "public welfare" and "public convenience" were too vague and indefinite so as to make the Ordinance, as construed and applied, illegal because of conferring ungovernable discretion on the City Council.

This Court has made similar holdings in cases involving the rights of freedom of press, speech, assembly and worship guaranteed by the First Amendment. Ordinances which require a permit, to be issued upon vague and indefinite terms or providing for censorship, as a condition precedent to the exercise of such guaranteed rights, have been held to be unconstitutional abridgment of such rights. See *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Saia* v. *New York*, 334 U. S. 558 (1948); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501-502 (1952); *Winters* v. *New York*, 333 U. S. 507 (1948); *Staub* v. *City of Baxley*, 355 U. S. 313, 324-325 (1958). It is submitted that the decision of the court below approving the Ordinance (requiring a permit as a condition precedent for the building of a church, which can be granted or denied under vague terms conferring ungovernable discretion by the City Council) is erroneous because the Ordinance is unconstitutional for the same reasons as those stated by this Court in the above cases.

The church building is as necessary to the pulpit preacher in the exercise of freedom of worship for himself and his congregation of listeners as is the religious pamphlet to the street evangelist or the door-to-door missionary. Freedom of religion guarantees the right to use literature as a part of preaching. (*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944)) It also guarantees the right to use a public park as a pulpit. (*Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951)) By force of the same reason the First Amendment guarantees the right to have a privately-owned church pulpit and place of assembly for worship.

Without a place to assemble there cannot be religious worship. Without owning real estate and the right to build or have a church building there can be no place of assembly for worship. The use of real estate and the right to build a church on it are necessary ancillaries to freedom of worship. They cannot be abridged except for reasons that are strong and sufficiently compelling, as in the distribution of religious literature cases. (*Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follet* v. *Town of McCormick*, 321 U. S. 573 (1944); *Kunz* v. *New York*, 340 U. S. 290 (1951); compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), with *Taylor* v. *Mississippi*, 319 U. S. 583 (1943)) No such reasons exist in this case.

There is a basic error in the approach taken by the court below in disposing of the federal constitutional question here discussed. The court treated the question as though all that was involved was the due process clause of the Fourteenth Amendment and the protection of property under it. It failed completely to consider and weigh the heavier provisions of the First Amendment against (1) the measures employed in the ordinance, (2) their remote re-

lationship to public welfare and convenience and (3) their failure to resort to more direct and conventional police traffic control devices or alternative entrances to the property. This omission in the judicial function by the court below, which is compelled by federal constitutional practice, produced the error here complained of. This erroneous exercise of the judicial function is out of harmony with *Schneider* v. *New Jersey*, 308 U. S. 147, 161-162 (1939). That case prohibits such severe measures taken against fundamental liberty that have only a remote relationship to the evil to be dealt with. It also holds that the constitutional right outweighs such speculative advantages to municipal convenience.

The court below, instead, applied the rules applicable to commercial uses prohibited by zoning laws under the due process clause of the Fourteenth Amendment insofar as it relates only to property. It failed to follow the mandate of this Court in cases under the First Amendment and the Fourteenth Amendment in the following cases: *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940); *Martin* v. *City of Struthers*, 319 U. S. 141, 151-152 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573, 575; *Kovacs* v. *Cooper*, 336 U. S. 77, 88 (1949); *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949). See also *Pittsford* v. *City of Los Angeles*, 50 Cal. App. 2d 25, 32, 122 P. 2d 535 (1942); In re *Mares*, 75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946). Had the court below followed the rule stated in the above cases, which is applicable in this case, the speculative and remote considerations and justifications—relevant to commercial uses but not to church use—relied upon for sustaining the Ordinance would have been rejected.

The departure taken by the court below from the above-stated cases decided by this Court is grounds for taking this case in for decision. Also the approval as valid under

the federal Constitution of an Ordinance that, under the guise of regulation, in its operation prohibits the exercise of freedom of worship by barring all new churches from the largest residential area of the city, except upon permit granted by the City Council, is of such broad national interest and of such great public importance that it alone calls for the exercise of this Court's jurisdiction to decide this case.

The court below relied upon the presumption of constitutionality of the Ordinance and of the action under it by the City Council. [Tr. 20 (8-9, 12, 30); Op. 28] This does not apply in the First Amendment cases where no attack is made against the face of the Ordinance but the contention is that it is unconstitutional as applied. (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Busey* v. *District of Columbia*, 128 F. 2d 592, 595-596 (D. C. Cir. 1943)) The rule of denying presumption of constitutionality is also applied in cases involving zoning ordinances. (In re *Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706 (1946); *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 333, 289 P. 2d 438 (1955); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942)) The burden is upon the municipality in zoning law cases to prove the justification of abridgment of constitutional rights. (*Applestein* v. *Mayor and City Council of Baltimore*, 159 Md. 39, 47, 143 A. 666 (1930); *Synod of Ohio of United Lutheran Church* v. *Joseph*, 139 Ohio St. 229, 246-249 (1942)) The Supreme Court of Oregon defied the rule of the above cases. The court below not only refused to follow the above holdings but went a step further and, in the face of the lack of proof to support or justify the unconstitutional action of the City of Milwaukie, found that the Ordinance was presumed to be constitutional and that the action of the City Council was likewise presumed to be valid. [Tr. 20 (30); Op. 28]

The case of *Corporation of Presiding Bishop* v. *City of*

Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949) (appeal dismissed 338 U. S. 805 (1949)) commented upon in *American Communications Association* v. *Douds,* 339 U. S. 382, 397-398 (1950), relied on by the court below, is not in point. [Tr. 20 (41-44); Op. 39-41] The case did not involve a residential district where many other public uses and other non-residential uses were allowed, as here, but the ordinance operated only upon a small portion of the city and prohibited churches in only one small residential area of the city which was confined exclusively to single-family dwellings and no public and non-residential use was allowed as in this case. The case here is more like *Mooney* v. *Village of Orchard Lake,* 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman Catholic Welfare Corp.* v. *City of Piedmont,* 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777; 3 U.C.L.A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 23 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; and 3 St. Louis U. L. Jour. 265.

The court below quotes from *American Communications Association* v. *Douds,* 339 U. S. 382, 397-398 (1950), where the Court cites *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949). There the Court said that the ordinance that carved out a very small part of the city and made it exclusively residential (without any public uses) was a "relatively small" infringement upon freedom of religion. Here the entire 3-R-1 residential zone is not exclusively residential but it is a zone where churches are permitted along with other public uses. Appellant has been barred from this "appropriate place" for churches by the enforcement of the vague and indefinite provisions of Section 3 that is made applicable to the special use provision of the Ordinance (Section 16), both of which are city-wide in scope. Such provisions relied upon by the City Council to bar the appellant from having a church in the district cannot, by any stretch of the imagination, be said to be "relatively small" or simulated to a small exclu-

sively residential part of the city of Porterville, California.

The court below, in the concluding part of its opinion, retreats and finds a last refuge. Its last stand—without any record to support it—is that there may be other parts of Milwaukie and other parts of the district where appellant might have bought property, had no opposition to the proposed church and obtained a permit. [Tr. 20 (44); Op. 41-42] The plain answer to this sophistry of the Supreme Court of Oregon is supplied by this Court that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."—*Schneider* v. *New Jersey*, 308 U. S. 147, at page 163.

CONCLUSION

For the reasons above stated, this Court should conclude that the questions involved are substantial and of wide public importance so as to warrant the noting of jurisdiction, which should be done by this Court. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

HAYDEN C. COVINGTON

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Brooklyn 1, New York

Counsel for Appellant

March, 1959.

APPENDIX A

Judgment of Supreme Court of Oregon

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the 3rd day of March, 1958. WHEREUPON on this Wednesday, the 17th day of September, 1958, the same being the 40th judicial day of said term, there were present:

William C. Perry, Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
Harold J. Warner, Associate Justice,
Wm. M. McAllister, Associate Justice,
Gordon W. Sloan, Associate Justice,
Kenneth J. O'Connell, Associate Justice,
F. M. Sercombe, Clerk,

when the following proceedings were had:

MILWAUKIE COMPANY OF JEHOVAH'S WITNESSES, an Oregon Corporation,
Appellant,

v.

LEONARD MULLEN, Mayor, and FRED O. ROBERTS, PETE MORTONSEN, RALPH E. KLEIN and EARL CLAY, City Councilmen, comprising the City Council of the City of Milwaukie, Oregon,
Respondents.

} Appeal from Clackamas County

This cause on January 29, 1958, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered

all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT IS THEREFORE CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with Lewis E. Larson as its surety conditioned that said appellant will pay all damages, costs and disbursements which may be awarded against it on appeal,

IT IS THEREFORE ORDERED that respondents have and recover of and from appellant and its surety the sum of $30.00 costs and disbursements in this court,

IT IS FURTHER ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.